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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/730,493
Filing Date: December 08, 2003
Appellants: MORMAN ET AL.

James M. Bagarazzi
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed November 10, 2008 appealing from the Office action mailed June 4, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Serial No. 10/730,364.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The statement of the status of amendments contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct for Claims 1 and 18. The summary of claimed subject matter contained in the brief does not summarize the claimed subject matter of Claims 2-6, 9, 12-13, 15-17, or 19-21.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,846,232	**SERBIAK et al.**	**12-1998**
6,716,205	**POPP et al.**	**4-2004**

(9) Grounds of Rejection

The following grounds of rejection are applicable to the appealed claims:

Claims 1-6, 9, and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak (U.S. 5,846,232).

For Claim 1, Serbiak teaches an absorbent article including a chassis having a front waist region, a back waist region, and a crotch region extending between the front and back waist regions (Abstract, Figs. 1-9, col. 1, lines 6-10, col. 5, lines 62-67, col. 6, lines 1-10). An outer cover member 22 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23). A bodyside liner 24 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23). An absorbent body structure 36 is sandwiched between the outer cover member and the

bodyside liner (Figs. 1-9, col. 7, line 39 to col. 8, line 60). Serbiak teaches the bodyside liner 24 including a material having a necked base layer of a fluid permeable material, the base layer material being necked by being tensioned in a first direction (col. 4, lines 50-65, col. 7, lines 1-10). At least a first and a second strip of elastomeric material are attached to the necked base layer material with a space between the strips such that a center necked region of the base layer material is bordered on at least two longitudinally extending sides by flat planar composite regions of the elastomeric materials and the base layer material, the center region generally aligned with the absorbent body structure 36 (first and second strips include elastic layer 28 in extensible zones 30-30D; center region includes the crosshatched area of absorbent core 36; Figs. 1, 3-6, and 8, col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, col. 8, lines 26-48, col. 9, lines 18-23, Claims 10, 17, 23, 35, 48; note that Serbiak teaches that the elastic layer 28 can be disposed where the extensible zones 30-30D are and does not need to extend over a greater area; the extensible zones are indicated in the figures by circles). Serbiak teaches that outer cover member 22, bodyside liner 24, and elastomeric material 28 are secured to each other (col. 10, lines 38-48). Serbiak teaches the center region of the necked base layer material being attached to the immediately underlying portion of the absorbent body structure in registry with the center region of necked base layer material in its necked condition (Figs. 1-4 and 6, col. 2, lines 1-17, col. 4, lines 38-42, col. 6, lines 10-44, col. 8, lines 7-48; note that the cross-hatched area 37 of the absorbent core 36 is secured to base structure 26, which includes bodyside liner 24). The composite regions are fully capable of stretching in at least a second direction of the absorbent article

(composite regions include elastic layer 28 in extensible zones 30-30D; Figs. 1 and 3-6; col. 1, lines 39-67, col. 2, lines 17-42, col. 4, lines 50-65, col. 5, lines 45-47, col. 6, lines 1-10, col. 8, lines 26-48, col. 10, line 48 to col. 11, line 26, Claims 1 and 9). Serbiak teaches that attaching the absorbent core, which is nonextensible, to the base structure prevents extensibility of the absorbent article in the area controlled by the attachment of the absorbent core to the base structure (Figs. 1-4 and 6, col. 4, lines 38-49, col. 8, lines 8-26). Note that Figs. 1, 3, 5, and 6 of Serbiak are top views with the bodyside liner uppermost, which suggests that the attachment indicated by the cross-hatching in these figures includes direct attachment between the absorbent body structure and the necked base layer material of the bodyside liner. Serbiak does not expressly teach that the first and second strips of elastomeric material are bonded directly to the necked base layer material, nor that the attachment of the center region of the base layer material to the underlying portion of the absorbent body structure is by direct bonding. In light of Serbiak's teaching of securing the elastomeric material to the necked base layer material of the bodyside liner, it would have been obvious to one of ordinary skill in the art to directly bond the elastomeric material to the necked base layer material. In light of Serbiak's indication in Figs. 1, 3 and 5-6 of attachment to the absorbent body structure being apparent in a top view, and Serbiak's teaching that attachment of the absorbent body structure to the base layer material prevents extensibility in the area of the absorbent body structure, it would have been obvious to one of ordinary skill in the art to include direct bonding of the base layer material of the bodyside liner to the underlying portion of the absorbent body structure.

For Claim 18, Serbiak teaches an absorbent article including a chassis having a front waist region, a back waist region, and a crotch region extending between the front and back waist regions (Abstract, Figs. 1 and 3-6, col. 1, lines 6-10, col. 5, lines 62-67). An outer cover member 22 extends longitudinally between the front and back waist regions (Figs. 1-9, col. 6, lines 1-23). A bodyside liner 24 extends longitudinally between the front and back waist regions (Figs. 1 and 3-6, col. 6, lines 1-23). An absorbent body structure 36 is sandwiched between the outer cover member and the bodyside liner (Figs. 1 and 3-6, col. 7, line 39 to col. 8, line 60). Serbiak teaches the bodyside liner 24 including a material having a necked base layer of a generally fluid permeable material, the base layer material being necked by being tensioned in a longitudinal direction (col. 3, lines 17-41, col. 4, lines 50-65, col. 7, lines 1-10). The necked base layer includes a center region extending in the longitudinal direction and disposed between a first side region extending in the longitudinal direction and a second side region extending in the longitudinal direction (Figs. 1 and 3-6, col. 3, lines 17-41, col. 4, lines 50-65, col. 7, lines 1-10). A strip of elastomeric material is attached to the necked base layer material along the longitudinally extending first side region to form a flat planar composite region such that the center region of the necked base layer material is adjacent a longitudinally extending composite region of the elastomeric material and the base layer material (strip includes elastic layer 28; center region includes the crosshatched area of absorbent core 36; Figs. 1-9, col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, col. 8, lines 26-48, col. 9, lines 18-23, Claims 10, 17, 23, 35; note that Serbiak teaches that the elastic layer 28 can be disposed where the

extensible zones 30-30D are and does not need to extend over a greater area; the extensible zones are indicated in the figures by circles). Serbiak teaches that outer cover member 22, bodyside liner 24, and elastomeric material 28 are secured to each other (col. 10, lines 38-48). Serbiak teaches the center region of the necked base layer material generally overlying and attached to the immediately underlying portion of the absorbent body structure in registry with the center region of necked base layer material in its necked condition (Figs. 1-4 and 6, col. 2, lines 1-17, col. 4, lines 38-42, col. 6, lines 10-44, col. 8, lines 7-48; note that the cross-hatched area 37 of the absorbent core 36 is secured to base structure 26, which includes bodyside liner 24). The center region of base layer material remains generally non-elastic (nonextensible area 37 is non-elastic, col. 8, lines 18-36). The composite regions are fully capable of stretching in at least a transverse direction in use of the absorbent article (Figs. 1-4 and 6, col. 7, lines 11-38, col. 11, lines 8-12). Serbiak teaches that attaching the absorbent core, which is nonextensible, to the base structure prevents extensibility of the absorbent article in the area controlled by the attachment of the absorbent core to the base structure (Figs. 1-4 and 6, col. 4, lines 38-49, col. 8, lines 8-26). Note that Figs. 1, 3, 5, and 6 of Serbiak are top views with the bodyside liner uppermost, which suggests that the attachment indicated by the cross-hatching in these figures includes direct attachment between the absorbent body structure and the necked base layer material of the bodyside liner. Serbiak does not expressly teach that the strip of elastomeric material is bonded directly to the necked base layer material, nor that the attachment of the center region of the base layer material to the underlying portion of the absorbent body structure is by direct

bonding. In light of Serbiak's teaching of securing the elastomeric material to the necked base layer material of the bodyside liner, it would have been obvious to one of ordinary skill in the art to directly bond the elastomeric material to the necked base layer material. In light of Serbiak's indication in Figs. 1, 3 and 5-6 of attachment to the absorbent body structure being apparent in a top view, and Serbiak's teaching that attachment of the absorbent body structure to the base layer material prevents extensibility in the area of the absorbent body structure, it would have been obvious to one of ordinary skill in the art to include direct bonding of the base layer material of the bodyside liner to the underlying portion of the absorbent body structure.

For Claims 2 and 19, Serbiak teaches the first and second strips of elastomeric materials being superimposed on and aligned with lateral sides of the underlying base layer material (first and second strips include elastic layer 28 in extensible zones 30-30D; Figs. 1-9, col. 2, lines 42-47, col. 6, lines 24-31, col. 7, lines 11-38, col. 8, lines 26-48, col. 9, lines 18-23, Claims 10, 17, 23, 35).

For Claim 3, Serbiak teaches the first and second strips of elastomeric materials including an elastic film (first and second strips include elastic layer 28 in extensible zones 30-30D; Abstract, Figs. 1, 3-6, and 8, col. 2, lines 42-47, col. 7, lines 11-39, Claims 23, 43, and 46). Serbiak teaches the strips being attached to the base layer material, as described above for Claim 1. Serbiak teaches a neck bonded laminate as part of the bodyside liner 24 (col. 4, lines 50-65, col. 7, lines 1-10; note U.S. Patent No. 5,226,992 to Morman is incorporated by reference). Serbiak does not expressly teach the first and second strips and the base layer material being a neck bonded laminate.

However, direct bonding between the first and second strips and the necked base layer material would form a neck bonded laminate. It would have been obvious to one of ordinary skill in the art to directly bond the first and second strips and the necked base layer material, for the same reasons as described above for Claim 1; this would form a neck bonded laminate.

For Claims 4 and 20, Serbiak teaches the first and second strips of elastomeric materials being attached to the base layer material in a generally untensioned state (first and second strips include elastic layer 28 in extensible zones 30-30D, col. 1, lines 55-60, col. 3, lines 53-66, col. 7, lines 22-38, col. 10, lines 38-58, Claim 1).

For Claims 5 and 21, Serbiak teaches first and second strips of elastomeric materials, which are fully capable of being attached to the base layer material in a generally tensioned state (elastic layer 28 can be placed in a state of tension while attached to the base layer material by extending the material; col. 7, lines 11-36).

For Claim 6, Serbiak teaches the base layer material being tensioned in the machine direction prior to attaching the first and second strips of elastomeric materials to opposite lateral sides of the base layer material (col. 4, lines 49-65, col. 7, lines 1-10; note Morman, U.S. 5,226,992, is incorporated by reference). The bodyside liner of Serbiak is fully capable of having the longitudinal strips of the composite regions be stretchable in the cross direction bordering the center machine direction region of the necked base layer material (Figs. 1-4 and 6, col. 7, lines 1-38).

For Claim 9, Serbiak teaches the base layer material being reversibly necked and creped (col. 4, lines 49-65, col. 7, lines 1-10, col. 10, line 38 to col. 11, line 10; note

Morman '992 is incorporated by reference). Serbiak teaches the base layer material being reversibly necked prior to attachment of the first and second strips of elastomeric materials to opposite lateral sides of the base layer material, the base layer material being rendered stretchable such that the bodyside liner material is stretchable in the transverse direction and the longitudinal direction (Figs. 1-4 and 6, col. 4, lines 49-65, col. 7, lines 1-10, col. 10, line 38 to col. 11, line 10). Serbiak is silent as to the base layer material being creped prior to attachment. The limitation of when the creping is done is being treated as a product by process limitation. As set forth in MPEP 2113 product by process claims are not limited to the manipulations of the recited steps, only to the structure implied by the steps. Once a product appearing to be substantially the same or similar is found, a 35 U.S.C. 103 rejection may be made and the burden is shifted to applicant to show an unobvious difference. See MPEP 2113. Thus, even though Serbiak is silent as to the base layer material being creped prior to attachment, it appears that the article in Serbiak would be the same or similar as that claimed. See *In re Thorpe,* 227 USPQ 964 (Fed Cir. 1985), and *Ex parte Masham*, 2 USPQ2d 1647 (BPAI 1987).

Claims 12-13 and 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak in view of Popp (U.S. 6,716,205).

For Claim 12, Serbiak teaches all the limitations of Claim 1, as described above. Serbiak teaches the composite regions of the bodyside liner defining machine direction strips extending laterally from the center region (Figs. 1-4 and 6, col. 7, lines 1-10, col.

8, lines 8-48). Serbiak teaches the outer cover member and the composite regions of the bodyside liner both being formed of similar materials (col. 6, lines 44-67, col. 7, lines 1-10). Serbiak does not expressly teach each of the composite regions being folded to form a folded composite region at a respective opposite side fold line of the chassis, extending laterally back under the absorbent body structure, and being attached to each other such that the folded composite regions also define the outer cover member of the chassis. Applicant's specification does not disclose that this configuration serves any stated purpose or solves any particular problem. In addition, this feature is well known in the art. Popp confirms this and teaches elasticized composite strips being folded at a side fold line of the chassis, extending laterally back under the absorbent body structure, and being attached to each other such that the composite regions also define the outer cover member of the chassis (Abstract, Figs. 1-4, col. 5, line 18 to col. 6, line 57). Popp teaches that this configuration creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (col. 1, lines 35-67). It would have been obvious to one of ordinary skill in the art at the time of the invention by the Applicant to modify Serbiak to include each of the composite regions being folded to form a folded composite region at a respective opposite side fold line of the chassis, extending laterally back under the absorbent body structure, and being attached to each other such that the folded composite regions also define the outer cover member of the chassis, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

For Claim 13, Serbiak teaches leg elastics 40 (Figs. 1-4 and 6, col. 8, lines 26-48). Serbiak does not expressly teach leg elastics between the folded composite regions. Popp teaches leg elastics between folded composite regions (Abstract, Figs. 1-4, col. 5, line 18 to col. 6, line 57). It would have been obvious to modify Serbiak to include leg elastics between folded composite regions, for the same reasons as described above for Claim 12.

For Claim 15, Serbiak does not teach portions of the composite regions of the bodyside liner being folded outboard of the absorbent body structure so as to define longitudinally extending containment flaps on opposite lateral sides of the absorbent body structure. However, containment flaps formed from folded parts of the bodyside liner are well known in the art. Popp confirms this and teaches an absorbent article with containment flaps formed from folded parts of the bodyside liner (Abstract, Figs. 1-4, 7, col. 1, lines 35-63, col. 5, line 18 to col. 6, line 17). Popp teaches that this configuration creates a bucket for containing body fluids with a soft and comfortable leg and side seal (col. 1, lines 60-63). It would have been obvious to one of ordinary skill in the art to modify Serbiak to include containment flaps formed from folded parts of the bodyside liner, as taught by Popp, for the same reasons as described above for Claim 12.

For Claim 16, Serbiak teaches the composite regions being attached to an underside of the absorbent body structure (Figs. 1-4 and 6, col. 8, lines 8-47).

For Claim 17, Serbiak teaches the composite regions of the bodyside liner defining longitudinal strips extending outwardly from the center region and defining elastomeric side panels (Figs. 1-4 and 6, col. 7, line 1 to col. 8, line 48). Serbiak

teaches the absorbent article being a training pant (col. 5, lines 62-67). Serbiak does not expressly teach the elastomeric side panels being attached at side seams of the chassis to define a pant-like structure, with the composite regions folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure and attached to each other such that the composite regions define the outer cover member of the chassis. Applicant's specification does not disclose that this configuration serves any stated purpose or solves any particular problem. In addition, elastomeric side panels attached at side seams to define a pant-like structure are well known in the art; side panels folded outboard and extending laterally back under the absorbent body structure and attached to each other such that the composite regions define the outer cover member are also well known in the art. Popp confirms this and teaches a training pant with elastomeric side panels attached at side seams of the chassis to define a pant-like structure, with the composite regions folded outboard of the side panels at fold lines and extending laterally back under the absorbent body structure and attached to each other such that the composite regions define the outer cover member of the chassis (Abstract, Figs. 1-4, col. 5, line 18 to col. 6, line 57). Popp teaches that this configuration creates a bucket for containing body fluids, with a soft and comfortable leg and side seal (col. 1, lines 35-67). In light of Serbiak's teaching of a training pant, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify Serbiak to include the elastomeric side panels being attached at side seams of the chassis to define a pant-like structure, with the composite regions folded outboard of the side panels at fold lines and extending laterally back under the

absorbent body structure and attached to each other such that the composite regions define the outer cover member of the chassis, as taught by Popp, to create a bucket for containing body fluids, with a soft and comfortable leg and side seal, as taught by Popp.

(10) Response to Argument

Applicant argues that the elastic layer 28 as shown in Fig. 2 of Serbiak is continuous, and therefore fails to leave a space between the strips. Fig. 2 of Serbiak clearly does show a continuous elastic layer 28. However, Serbiak makes clear that embodiments are contemplated which do not have a continuous elastic layer 28, and instead have elastic layer 28 only in the extensible zones (col. 2, lines 42-47, col. 8, lines 8-16, col. 9, lines 18-23, Claim 10). The fact that embodiments which do not leave a space between the strips are disclosed does not constitute a teaching away from a broader disclosure or a nonpreferred embodiment. See *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). A reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill the art, including nonpreferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989). See also *Celeritas Technologies Ltd. v. Rockwell International Corp.*, 150 F.3d 1354, 1361, 47 USPQ2d 1516, 1522-23 (Fed. Cir. 1998).

Applicant argues that the prior Final Office Action is relying on Serbiak as a source of different elements that are to be taken from different embodiments and

reconstructed. However, Serbiak teaches that the various disclosed elements may be combined (col. 12, lines 23-26).

Applicant argues that Serbiak never acknowledges that a space would be necessary to prevent the elastic layer 28 from compromising the structural integrity of the center necked region of a bodyside liner or an underlying absorbent body structure with a desired capillary configuration. The claims do not do not deal with structural integrity and do not require any particular capillary configuration. Serbiak teaches both a continuous elastic layer 28 and a discontinuous elastic layer 28 (Fig. 2, col. 2, lines 42-47, col. 8, lines 8-16, col. 9, lines 18-23, Claim 10). The fact that Serbiak does not give any particular reason why a discontinuous elastic layer 28 might be used does not constitute a teaching away from this configuration.

Applicant argues that "fixed to base structure 26" and "effectively attached to the base structure 26" might mean only "fixed to the cover 22" and "effectively attached to the cover 22". However, the question is what these phrases would suggest to a person of ordinary skill in the art. Serbiak teaches that the absorbent core 36 is secured to the base structure 26 in the nonextensible areas, that the base structure 26 is composed of the bodyside liner 24 and the outer cover 22, and that the absorbent core 36 is adjacent to the bodyside liner 24 (col. 2, lines 8-14, col. 3, lines 52-54, col. 4, lines 38-42, col. 6, lines 10-14 and 41-43, col. 8, lines 8-20, col. 9, lines 33-36, col. 10, lines 12-32, Claims 3, 12, 31, 44, 48). Taken together, these teachings suggest direct attachment of the absorbent core and the bodyside liner in the nonextensible areas of Serbiak. The term "mounted" also suggests attachment between the surfaces (see col. 6, lines 41-43, col.

8, lines 8-10). Certainly Serbiak does not teach away from direct attachment between the bodyside liner 24 and the absorbent core 36 in the nonextensible areas.

Applicant argues that direct bonding is completely different from indirect attachment. Applicant's specification suggests that direct bonding and indirect bonding are equivalent in some contexts (specification, page 8, lines 23-28, paragraph 37 as published). Popp also suggests that direct and indirect bonding are equivalent (Popp, col. 2, lines 48-53).

Applicant argues that direct bonding of the absorbent core to the bodyside liner layer can preserve the capillary structure that is ideally desired for acceptance of the insult liquids. While Serbiak does not mention protecting the capillary structure of the absorbent core 36 in the nonextensible areas, the structure described by Serbiak appears to function in the same way (col. 4, lines 38-42, col. 6, lines 10-43, col. 7, line 1 to col. 10, line 58, Claim 3).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Paula Craig

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